STATE OF MICHIGAN

IN THE 20TH CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET
414 Washington Street
Grand Haven, Michigan 49417
(616) 846-8320
* * * * *

CHARLES R. MURRAY and **SHORESCAPE INVESTMENTS, LLC**, a Michigan limited liability company,

Plaintiffs/Counter-defendants,

v

JAMES H. SCHULTZ and SCHULTZ TRANSPORT, INC., now known as **J. SCHULTZ INVESTMENTS, INC.**, a Michigan corporation, jointly and severally,

Defendants/Counter-plaintiffs,

and

JAMES H. SCHULTZ and SCHULTZ TRANSPORT, INC., now known as **J. SCHULTZ INVESTMENTS, INC.**, a Michigan corporation, jointly and severally,

Counter-plaintiffs/Defendants,

v

CHARLES R. MURRAY and **SHORESCAPE INVESTMENTS, LLC**, a Michigan limited liability company,

Counter-defendants/Plaintiffs.
_____/

OPINION AND ORDER GRANTING RECONSIDERATION
Case No.: 16-4678-CB

Hon. Jon A. Van Allsburg

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At a session of said Court, held in the Ottawa County
Courthouse in the City of Grand Haven, Michigan
on the 18th day of June, 2018

This case concerns the sale of the assets of a landscaping, excavating, and snowplowing business now known as J. Schultz Investments, Inc. (JSI). Plaintiffs Charles Murray and Shorescape Investments LLC (Shorescape) are the purchasers; defendants are the sellers. Shorescape is engaged in the business of snowplowing and landscaping. The sale was in the total amount of 1.8 million dollars, and $450,000 of that total was financed by a note given to JSI by Shorescape and by Charles R. Murray, individually.[1] The parties settled at case evaluation, with a $120,000 award to plaintiffs. The court set that amount off from the balance of the promissory note owed to defendant JSI.

Defendant moves for reconsideration, asserting that the Court has palpably erred in equitably setting off the $120,000 case evaluation award against the $450,000 note owed to defendant JSI in the underlying sale. Defendants assert that setoff is inappropriate in this case because the parties on the two obligations are not identical: the case evaluation award is a joint obligation of the defendants owed to both plaintiffs, whereas the underlying promissory note is a joint obligation of the plaintiffs to just one of the defendants (JSI). Defendant argues that correction of this error will change the outcome of the case and permit entry of a $120,000 money judgment against plaintiffs. For the reasons stated below, defendants' motion is granted.

Standard of Review

The requirements and standards for a Motion for Reconsideration are found in MCR 2.119(F), which states:

> (F) Motions for Rehearing or Reconsideration.
> (1) Unless another rule provides a different procedure for reconsideration of a decision (see, e.g., MCR 2.604(A), 2.612), a motion for rehearing or reconsideration of the decision on a motion must be served and filed not later than 14 days after entry of an order disposing of the motion.
> (2) No response to the motion may be filed, and there is no oral argument, unless the court otherwise directs.

[1] In addition to being a co-maker of the promissory note, Charles R. Murray also personally guaranteed the debt.

> (3) Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

A court has considerable discretion in granting reconsideration to correct mistakes, preserve judicial economy, and minimize costs to the parties. Generally, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. *Churchman v Rickerson*, 240 Mich App 223; 611 NW2d 333 (2000). The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error. To be "palpable" is to be easily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, or manifest. *Luckow Estate v Luckow*, 291 Mich App 417, 805 NW2d 453 (2011). The court may properly deny a motion for reconsideration based on a legal theory and facts which could have been pled or argued prior to the trial court's original order. *Werdlow v Detroit Policemen and Firemen Retirement System Board of Trustees*, 269 Mich App 383, 711 NW2d 404 (2006).

Analysis

Plaintiffs cite MCL 600.6008, which states:

> (1) Executions between the same parties may be set off one against another, if required by either party as follows:
> (a) When 1 of the executions is delivered for service, the person who is the debtor therein may deliver his execution to the serving officer and it shall be applied, as far as it will extend, to the satisfaction of the first execution; and such application shall be indorsed on each execution. Only the balance due on the larger execution may then be collected and paid in the same manner as if there had been no set off.
> (b) Such set off shall not be allowed unless all the parties are mutual debtors and creditors. Nor shall set off be allowed where the sum due on the first execution shall have been lawfully assigned to another person before the creditor in the second execution becomes entitled to the sum due thereon, or as to so much of the first execution as may be due to the attorney in that suit for his taxable fees and disbursements.
> (2) If, upon an appeal, a recovery for a debt or damages be had by 1 party, and costs be awarded the other, execution shall issue only in favor of the party to whom there shall be a balance due, and for the amount of such balance.

The cited statute is part of the Revised Judicature Act, and pertains to the enforcement of money judgments, specifically by writ of execution against property. MCL 600.6001 *et seq.* In this case, the court did not apply a statutory setoff pursuant to the above statute, but equitable setoff. The first question, then, is whether there is a distinction between the two that is relevant to the case before the court. The court concludes there is not. Setoff is a legal or equitable remedy that may occur when two entities that owe money to each other apply their mutual debts against each other. See, generally, *Ellis v Phillips,* 363 Mich 587, 599; 110 NW2d 772 (1961); *United States v NBD Bank, NA,* 922 F.Supp. 1235, 1249 (ED Mich, 1996). In general, absent a statutory mandate authorizing a setoff in a particular circumstance, setoff is a matter in equity. See, generally, 20 Am Jur 2d, Counterclaim, Recoupment, and Setoff, § 11, p. 236.

Setoff has generally been applied to parties with competing judgments:

> "... it is no objection to a set-off of judgments that the claims upon which they were based could not have been offset against each other. A judgment founded upon contract may be set off against a judgment for damages suffered from a tort, and vice versa. The fact that the claim upon which a judgment was obtained was an unliquidated one is no objection to offsetting such judgment against another one, since when reduced to judgment the claim becomes liquidated and merged." *Franklin Co. v Buhl Land Co.,* 264 Mich 531, 534; 250 NW 299 (1933).

In *Mahesh v Mills*, 237 Mich App 359; 602 NW2d 618 (1999), the parties arbitrated competing claims alleging breach of contract. In affirming a setoff, the Court of Appeals noted that the setoff occurred before the parties obtained writs of execution on their respective judgments, so that equitable principles, rather than the statute, applied. However, The Court held that the same rules apply: "Equity follows the analogies of the law in all cases where analogous relief is sought upon a similar claim," referencing *Lothian v Detroit,* 414 Mich 160, 169; 324 NW2d 9 (1982) (quoting *Michigan Ins. Co. of Detroit v Brown,* 11 Mich 265, 272 (1863)).

In *Minority Earth Movers, Inc. v Walter Toebe Const. Co.*, 251 Mich App 87; 649 NW2d 397 (2002), the Court of Appeals considered whether there should have been one judgment for the net difference of the mediation evaluations [read: case evaluations], or separate judgments on the separate evaluations for the claim and counterclaim arising in the same action. The Court concluded that the competing claims arose out of, or were connected with, the same transaction or contract, and that the purpose of the case evaluation rule was to expedite and simplify the final

settlement of cases. The entry of two judgments in the case had significantly complicated the final settlement of this case, and the case was remanded for entry of a single net judgment. That analysis could apply with equal force to the present case. This court is not persuaded that the fact that Mr. Murray is not a party to the promissory note owed by his solely-owned company prohibits setoff where he was a named defendant, jointly and severally with his company, in the litigation that gave rise to the case evaluation award.[2]

However, Plaintiffs offer another basis for finding that setoff should not be allowed. Plaintiffs cite three cases for the proposition that equitable setoff may not be ordered where one of the obligations to be setoff is not yet due. In the earliest of these, *Mechanics' Bank of Detroit v Stone*, 115 Mich 648; 74 NW 204 (1898), the Michigan Supreme Court stated, "This court has said several times that mere insolvency was insufficient to justify an equitable set-off of a claim not due. *Lockwood v Beckwith*, 6 Mich 174; *Hale v Holmes*, 8 Mich 41; *Kinney v Tabor*, 62 Mich 517, 527; 29 NW 86." 115 Mich, at 649.

In the next case cited by petitioner, *Koegel v Michigan Trust Co.*, 117 Mich. 542; 76 N.W. 74 (1898), the president of a failed bank owned the building in which the bank was a tenant. He assigned his right to both past-due and future rent to his daughter, who brought a claim against the bank's receiver. The receiver sought to setoff against the rent claim the bank president's substantial debt owed to the bank. The trial court denied setoff, and the Michigan Supreme Court affirmed, stating "a debt which is due and payable from an assignor cannot be set off against an assigned claim which is not due and payable at the time of the assignment. We think this rule too well settled to need discussion." *Id.*, at 543-544.

In the most recent of the three cases, *Reichert v Farmers' State Bank*, 263 Mich 305; 248 NW 630 (1933), the petitioner received promissory notes from its customers and then indorsed and discounted them to the bank where it held a deposit account. When the bank failed, the petitioner sought to have the notes set off against its account balance. The Michigan Supreme Court affirmed the denial of the petition, stating:

[2] See *Lambert*, cited below, for the suggestion that defendant Murray could be considered a real party in interest for purposes of setoff, if the note were otherwise due and payable.

> To justify set-off, the accounts must be mutual. The liability of petitioner to the bank on the notes was contingent, by reason of indorsement. That of the bank to the petitioner on the deposit was direct. Consequently the accounts were not mutual and set-off could not be permitted. *Mechanics' Bank of Detroit v. Stone*, 115 Mich. 648, 74 N. W. 204, is in point. *Id.*, at 307.

The age of the above-cited cases is a sign that these issues rarely arise. Yet *Reichert* is still good law, as indicated by its citation in the more recent appellate decision of *Lambert v Harbor Springs Real Estate Corp.*, unpublished per curiam opinion of the Court of Appeals (Docket No. 204605, May 28, 1999),[3] in which the Court stated the following:

> Regardless of whether the set-off sought is legal or equitable in nature, as a general rule, in order for set-off to apply, the claims sought to be set off must be mutual and reciprocal such that the debtor on one side is the creditor on the other side, either as the nominal or the real party in interest. *Reichert v Farmers State Savings Bank,* 263 Mich. 305, 307; 248 NW 630 (1933); *Hapke v. Davidson,* 180 Mich. 138, 149-150; 146 NW 624 (1914); *Walker v. Farmers Ins Exchange,* 226 Mich.App 75, 79; 572 NW2d 17 (1997). *Id.*, at *2.

The promissory note in the present case was made on December 15, 2015, and requires payments over a term of 96 months, commencing 24 months after the date of the note, and ending with a final payment due November 15, 2025. However, the note further provides that payoff may not be sooner than December 15, 2025 (120 months from the date of the note) unless authorized by the U. S. Small Business Administration (SBA), and the commencement date of the schedule of payments is further subject to approval by the SBA. Any delay in the commencement of payments due to the lack authorization by the SBA will delay not only the commencement date of the schedule of payments, but the monthly payment amount and final payment date as well. Finally, the payment of the note was expressly subordinated to payment of all obligations owed to The Huntington National Bank pursuant to the terms of a Standby Agreement dated December 15, 2015.

It is undisputed that the debt owed by defendants Murray and Shorescape to JSI is not yet due and payable. Therefore, in accord with the *Mechanics' Bank of Detroit* line of cases, the case evaluation award may not be setoff against the JSI note dated December 15, 2015.

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[3] The court recognizes that it is not bound by this unpublished decision, MCR 7.215(C)(1); *Charles Reinhart Co v Winiemko*, 444 Mich 579, 588 n 19; 513 NW2d 773 (1994), and merely views the opinion as persuasive, *Dyball v Lennox*, 260 Mich App 698, 705 n 1; 680 NW2d 522 (2003).

Conclusion

Defendant's motion for reconsideration is GRANTED. The Order of May 25, 2018 is hereby VACATED, and defendants shall submit a final judgment to be entered upon the case evaluation award. The court further notes that Huntington National Bank has filed a motion to intervene, which the court now considers moot.

IT IS SO ORDERED.

Dated: June 18, 2018

Hon. Jon A. Van Allsburg, Circuit Judge